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No. 10-871

In the Supreme Court of the United States

GENERAL ELECTRIC COMPANY, PETITIONER

v.

LISA P. JACKSON, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9606(a), authorizes the Environmental Protection Agency (EPA) to issue administrative orders directing potentially responsible parties (PRPs) to clean up contaminated sites. Petitioner filed suit, alleging that Section 106(a) unconstitutionally deprives parties who are subjected to such orders of their property without due process of law. The questions presented are as follows:

1. Whether CERCLA, by affording PRPs opportunities for judicial review of a Section 106(a) order both before compliance (in the form of an EPA enforcement action) and after compliance (in the form of a reimbursement action), provides sufficient procedural safeguards to satisfy the Due Process Clause.

2. Whether a private market's reaction to the issuance of a Section 106(a) order that may affect the value of a company—apart from the costs of any cleanup or associated penalties—constitutes a deprivation of property.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-33a, 127a-139a) are reported at 610 F.3d 110 and 360 F.3d 188. The opinions of the district court (Pet. App. 36a-95a, 96a-126a, 140a-181a) are reported at 595 F. Supp. 2d 8, 362 F. Supp. 2d 327, and 257 F. Supp. 2d 8.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2010. A petition for rehearing was denied on September 30, 2010 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on December 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "in response to the serious environmental and health risks posed by industrial pollution." *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA "both provides a mechanism for cleaning up hazardous-waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citation omitted). Congress imposed strict liability on several classes of parties, including some facility owners and operators as well as parties that arrange for the transport, treatment, or disposal of hazardous substances. 42 U.S.C. 9607(a). Parties that may fall into these categories are known as "potentially responsible parties" or "PRPs." *Burlington N. & Santa Fe Ry.* v. *United States*, 129 S. Ct. 1870, 1878 (2009).

Congress gave the Environmental Protection Agency (EPA) several options for cleaning up contaminated sites. See *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 160-161 (2004). EPA's preferred approach is to reach a negotiated settlement with PRPs for performance of the cleanup. 42 U.S.C. 9622; see Pet. App. 74a. EPA can also clean up a site itself, drawing from the government's "Superfund" to pay for the work, and then sue the responsible parties to recover its cleanup costs. 42 U.S.C. 9604(a), 9607(a)(4)(A). Alternatively, under the provision at issue in this case—CERCLA Section 106(a), 42 U.S.C. 9606(a)—EPA can issue an administrative order directing a PRP to investigate or clean up a contaminated site. Before issuing a Section 106(a) order, EPA must determine that there may be "an imminent and substantial endangerment to the public health or

welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." 42 U.S.C. 9606(a).[1]

EPA typically gives potential recipients of Section 106(a) orders several opportunities to be heard before it issues a cleanup order. In identifying a party as a PRP, EPA formally notifies the party of EPA's views and allows that party to respond with any relevant information, including information disputing the party's liability. Pet. App. 4a, 74a. Before selecting a cleanup plan for a site, EPA invites, considers, and responds to comments from the PRP and the public. *Ibid.*; see 42 U.S.C. 9613(k)(2), 9617(b); 40 C.F.R. 300.415(n), 300.810-300.820. And before issuing a Section 106(a) order, EPA ordinarily tries to negotiate a resolution with the PRP. Pet. App. 74a. At each stage, EPA evaluates the information it receives and, if appropriate, may reconsider a party's CERCLA liability or the particular remedial plan at issue. *Ibid.*

After a Section 106(a) order is issued, CERCLA provides for two modes of judicial review: pre-cleanup enforcement proceedings and post-cleanup reimbursement proceedings. Section 113(h) of CERCLA provides, in pertinent part:

> No Federal court shall have jurisdiction under Federal law * * * to review any order issued under section 9606(a) of this title, in any action except one of the following:
>
> * * *

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[1] Although the statute refers to the President, the President has delegated his Section 106 authority to EPA. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

> (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
>
> (3) An action for reimbursement under section 9606(b)(2) of this title.

42 U.S.C. 9613(h).

The enforcement action referred to in Section 9613(h)(2) applies to PRPs that choose not to comply with a Section 106(a) order. In order to compel compliance or to recover the costs of its own cleanup, EPA must file a civil action in federal court. 42 U.S.C. 9606(b)(1), 9607(c)(3). In defending against such an action, the PRP may contest its liability and the legality of the Section 106(a) order. See 42 U.S.C. 9613(h)(2). If the court concludes that the party is liable for the cleanup and that the order is otherwise lawful, it can impose fines and punitive damages, but only if it concludes that the PRP has "willfully violate[d]" or "fail[ed] or refuse[d] to comply" with the Section 106(a) order "without sufficient cause." 42 U.S.C. 9606(b)(1), 9607(c)(3). If it makes such a finding, the district court has discretion to choose the amount (if any) of any fine up to the statutory ceiling of $37,500 per day of noncompliance (42 U.S.C. 9606(b)(1)),[2] as well as the amount of punitive damages (if any) up to three times the cleanup costs (42 U.S.C. 9607(c)(3)).

Parties that comply with a Section 106(a) order may invoke the reimbursement action referred to in Section 9613(h)(3). 42 U.S.C. 9613(h)(3). After finishing the

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[2] The original maximum penalty was $25,000, 42 U.S.C. 9606(b)(1), but EPA is required to update the maximum penalty to reflect inflation. See 73 Fed. Reg. 75,340 (2008); 74 Fed. Reg. 626, 627 (2009).

cleanup, those parties can ask EPA to reimburse their reasonable cleanup costs, plus interest. 42 U.S.C. 9606(b)(2)(A). If EPA refuses, they may sue EPA in district court. 42 U.S.C. 9606(b)(2)(B); see, *e.g.*, *Chem-Nuclear Sys., Inc.* v. *Bush*, 292 F.3d 254 (D.C. Cir. 2002) (reviewing denial of reimbursement request). The PRP can recover its costs if it shows that it was not liable under CERCLA or that some part of EPA's selected cleanup was arbitrary, capricious, or otherwise not in accordance with law. 42 U.S.C. 9606(b)(2)(C) and (D).

2. a. Petitioner filed suit in federal district court, seeking a declaratory judgment that CERCLA Section 106, 42 U.S.C. 9606, violates the Fifth Amendment's Due Process Clause. Pet. App. 6a-7a. Petitioner alleged that Section 106 "'imposes a classic and unconstitutional Hobson's choice': because refusing to comply 'risk[s] severe punishment [*i.e.*, fines and treble damages],' [Section 106(a) order] recipients' only real option is to 'comply . . . before having any opportunity to be heard on the legality and rationality of the underlying order.'" *Id.* at 6a (quoting Amended Compl. ¶ 4). Petitioner further alleged that it "'has been and is aggrieved by CERCLA's fundamental constitutional deficiencies' because it has repeatedly received [Section 106(a) orders] and is likely to receive them in the future." *Id.* at 6a-7a (quoting Amended Compl. ¶ 7).

In March 2003, the district court dismissed petitioner's complaint for lack of jurisdiction. Pet. App. 140a-181a. Based in part on petitioner's representation that it was "not * * * challenging any specific order" (*id.* at 157a (quoting Amended Compl. ¶ 7)), the court found that petitioner's suit was barred by 42 U.S.C. 9613(h). Petitioner appealed on that threshold question and the court of appeals reversed, holding that

CERCLA "does not bar [petitioner]'s facial constitutional challenge to CERCLA." Pet. App. 127a-128a.

b. On remand, petitioner pursued two claims: the facial due process challenge described above, and a "pattern and practice" challenge to EPA's administration of Section 106. The district court rejected petitioner's facial due process claim, granting EPA summary judgment on the ground that CERCLA provides constitutionally sufficient process. The court explained, *inter alia*, that by refusing to comply with a Section 106(a) order, a PRP can put EPA to its proof. If EPA brings an enforcement action, the PRP can seek judicial review of the order. The court rejected petitioner's claim that the potential fines and treble damages are so severe that they effectively foreclose judicial review. In the alternative, the court held that the statute at least can be applied constitutionally in emergency situations. Pet. App. 115a-126a.

The district court initially allowed petitioner's "pattern and practice" claim to proceed. The court read the court of appeals' prior opinion to authorize not only a facial challenge but also "a broader systemic challenge" to EPA's administration of CERCLA, and it concluded that petitioner has standing to pursue such a challenge because EPA had issued Section 106(a) orders to petitioner in the past. Pet. App. 106a, 109a-111a. After two years of discovery into EPA practices, however, the district court granted EPA summary judgment on that claim. The court agreed with petitioner that certain "consequential injuries" that a PRP might suffer as a result of a Section 106(a) order—*e.g.*, decline in stock price, loss of brand value, and increased cost of financing—qualify as protected property interests. The court concluded, however, that the significance of those inter-

ests, when considered together with the government's interests in enforcing CERCLA and the "very low" risk of error in Section 106 procedures, was insufficient to render EPA's practices unconstitutional. *Id.* at 36a-95a.

3. The court of appeals affirmed. Pet. App. 1a-33a.

a. The court of appeals first addressed petitioner's facial challenge that CERCLA does not provide adequate pre-deprivation judicial review for the out-of-pocket costs of complying with a Section 106(a) order (*i.e.*, the cleanup costs incurred by the PRP) because the threat of penalties leaves it no choice but to comply. Pet. App. 10a. The court acknowledged that, under *Ex parte Young*, 209 U.S. 123 (1908), a statutory scheme violates due process if "the penalties for disobedience are by fines so enormous . . . as to intimidate the [affected party] from resorting to the courts to test the validity of the legislation." Pet. App. 11a (quoting *Young*, 209 U.S. at 147). The court noted, however, that "statutes imposing fines—even 'enormous' fines—on non-complying parties may satisfy due process if such fines are subject to a 'good faith' or 'reasonable ground[s]' defense" or are "subject to judicial discretion." *Ibid.* (citations omitted).

The court of appeals held that CERCLA provides such safeguards. The court explained that CERCLA offers non-complying PRPs several levels of protection in that fines and treble damages will be imposed only if a federal court finds (1) that the Section 106(a) order was proper; (2) that the PRP has "willfully" violated the order or has failed to comply "without sufficient cause"; and (3) that, in the court's discretion, penalties are appropriate. Pet. App. 11a. The court concluded that, contrary to petitioner's assertion, "PRPs face no Hobson's choice" between incurring the costs of compliance and

risking penalties for noncompliance. *Id.* at 12a-13a. The court also noted that its rejection of petitioner's facial challenge to CERCLA Section 106 was consistent with the decisions of the three other courts of appeals that have considered the issue. *Ibid.* (citations omitted).

b. The court of appeals next addressed petitioner's contention that issuance of a Section 106(a) order deprives petitioner of a protected property interest by creating a "contingent liability" that can be expected to depress stock price, harm brand value, and increase the cost of financing. Pet. App. 13a. The court noted that petitioner's alleged injuries are "consequential," *i.e.*, that they derive not from EPA "extinguish[ing] or modify[ing] a right recognized by state law," but rather from "independent market reactions" to the issuance of a Section 106(a) order. *Id.* at 14a (citation omitted).

The court of appeals rejected petitioner's suggestion that, under *Connecticut* v. *Doehr*, 501 U.S. 1 (1991), due process protections are triggered by the threat of consequential injuries of the sort claimed here. Pet. App. 15a-16a. The court explained that, although *Doehr* "stands for the proposition that consequential injuries can affect the significance of the private interests at stake" in a due process challenge, *Doehr* does not imply that "consequential injuries, standing alone, merit due process protection." *Id.* at 16a. The court further concluded that *Paul* v. *Davis*, 424 U.S. 693 (1976), foreclosed any claim to due process protection based on the prospect of reputational damage. Pet. App. 16a-20a. Under *Paul* and its progeny, the court explained, plaintiffs who allege "stigma plus" due process claims must show not only that they have suffered reputational harm, but also that the government has "deprived them of some benefit

to which they have a legal right." *Id.* at 17a. The court of appeals further explained that a "stigma plus" claim based on alleged damage to property (as opposed to liberty) interests requires plaintiffs to demonstrate that the reputational damage "*completely* destroys the value of their property." *Id.* at 18a. Because petitioner had failed to show such an impact, the court concluded, any "stigma plus" claim failed. *Id.* at 20a.[3]

c. After determining that the district court had jurisdiction to entertain petitioner's "pattern and practice" challenge (Pet. App. 24a-30a), the court of appeals rejected that claim on the merits (*id.* at 30a-32a). The court relied on petitioner's concession that, if the consequential harms it alleged (stock price, brand value, and credit rating) are insufficient to trigger due process protection, then its "pattern and practice" claim necessarily fails. *Id.* at 30-31a.

The court of appeals agreed with the district court that the "pattern and practice" claim "adds little to [petitioner's] facial *Ex parte Young* challenge: regardless of EPA's policies, * * * a *judge* ultimately decides what, if any, penalty to impose." Pet. App. 32a (internal quotation marks and citation omitted). The court of appeals also noted the district court's finding that "instances of noncompliance are sufficiently numerous to suggest that PRPs are not, in fact, forced to comply." *Ibid.* The court added that, in light of the extensive procedures that EPA follows before issuing a Section 106(a) order,

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[3] The court of appeals also found that petitioner had waived its belated argument that the issuance of a Section 106(a) order "triggers due process protections because it follows a factfinding, adjudicatory proceeding." Pet. App. 20a. It then rejected that argument on the merits. *Id.* at 21a-23a.

"recipients may be complying in large numbers not because they feel coerced, but because they believe that [the orders] are generally accurate and would withstand judicial review." *Ibid.*[4]

ARGUMENT

Petitioner contends that (1) EPA's issuance of a Section 106(a) order, by requiring PRPs to expend funds on cleanup without an adequate opportunity for pre-compliance judicial review, violates regulated entities' rights under the Due Process Clause; and (2) consequential harms to stock price, brand value, and credit rating that might result from issuance of a Section 106(a) order constitute deprivations of a protected property interest. The court of appeals correctly rejected both those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Consistent with the rulings of every other court of appeals that has considered the question, the D.C. Circuit correctly held that EPA's issuance of a Section 106(a) order does not deprive the recipient of property without due process of law.

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[4] Petitioner does not appear to press any separate "pattern or practice" claim in its petition for certiorari. In the government's view, the court of appeals lacked jurisdiction to consider that claim. To the extent that petitioner's claim seeks pre-enforcement judicial review of one or more specific Section 106(a) orders, it is barred by 42 U.S.C. 9613(h). To the extent that petitioner seeks review of EPA's general enforcement practices, divorced from any particular Section 106(a) order, its challenge is inconsistent with the Article III requirement that a plaintiff seek relief from "specifically identifiable Government violations of law." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 568 (1992) (citation omitted); see *City of Rialto* v. *West Coast Loading Corp.*, 581 F.3d 865, 871 (9th Cir. 2009).

a. The first step in the due process inquiry is to determine whether the plaintiff has been deprived of a protected property interest. If such a deprivation has occurred, the second step requires balancing the significance of the protected interest, the government's competing interest, and the risk of erroneous deprivation relative to the value of any additional safeguards. Pet. App. 9a-10a (citing *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). To succeed on its facial challenge, petitioner must demonstrate "that no set of circumstances exists under which [CERCLA Section 106(a)] would be valid," or that its provisions lack any "plainly legitimate sweep." *Id.* at 9a (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) and *Washington* v. *Glucksberg*, 521 U.S. 702, 740 n.7 (1997)).

Although a PRP has a protected property interest in money spent to perform remediation required by a Section 106(a) order or to pay any court-imposed penalties, CERCLA provides PRPs with ample procedural safeguards against an unlawful deprivation of such funds. First, even before a Section 106(a) order is issued, EPA provides notice to a PRP, which may submit information disputing liability or otherwise contesting the issuance or scope of a cleanup order at multiple stages of the process. See p. 3, *supra*.

Second, if a PRP chooses not to comply with any Section 106(a) order that is issued after that process, it will not have paid any cleanup costs. If EPA then seeks to compel compliance with the order, it must bring a civil enforcement action in federal district court. 42 U.S.C. 9613(h)(2); see pp. 3-4, *supra*. In such an action, the PRP is entitled to assert as a defense that it is not liable under CERCLA; that the required cleanup is arbitrary

or capricious; or that issuance of the Section 106(a) order violated its due process rights. 42 U.S.C. 9606(b)(2)(C) and (D); see *United States* v. *Capital Tax Corp.*, No. 04-C-4138, 2007 WL 488084, at *3-*4 (N.D. Ill. Feb. 8, 2007) (considering due process counterclaim). CERCLA therefore entitles the recipient of a Section 106(a) order to judicial review *before* the PRP can be forced to incur any cleanup costs.

Third, a PRP can comply with a Section 106(a) order and then seek reimbursement of the cleanup costs it has incurred (plus interest). See pp. 4-5, *supra*; 42 U.S.C. 9606(b)(2), 9613(h)(3). Although not necessary to satisfy due process in light of the other aforementioned protections, the reimbursement provision "trims the horns" of any dilemma a party might believe it faces as a result of an allegedly improper Section 106(a) order. See *Employers Ins. of Wausau* v. *Browner*, 52 F.3d 656, 661-662 (7th Cir. 1995); see also *City of Rialto* v. *West Coast Loading Corp.*, 581 F.3d 865, 871 (9th Cir. 2009) (PRP "can obtain judicial review of the validity of a [Section 106(a) order] either *before* or *after* it has complied with the order.").

b. In disputing the constitutional sufficiency of those procedural protections, petitioner raises essentially one argument: that the threat of fines and punitive damages for seeking pre-compliance judicial review makes that option inadequate under *Ex parte Young*, 209 U.S. 123 (1908). Pet. 19-26. The court of appeals correctly rejected that contention.

In *Young*, the Court considered the constitutionality of state laws that imposed mandatory penalties for charging certain railroad freight rates. 209 U.S. at 127-128. A company could obtain review of those laws

only by disobeying them and risking substantial automatic penalties if it did not prevail. *Id.* at 145-146. The Court held the laws unconstitutional, reasoning that the burden of automatic penalties was so severe that the laws effectively "preclude[d] a resort to the court * * * for the purpose of testing [their] validity." *Id.* at 146-148.

Since *Young*, the Court has clarified that statutes imposing fines for noncompliance with a government order are constitutional as long as imposition of penalties is not automatic but instead is subject to a "good faith" defense or judicial discretion or plenary review. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 218 (1994) (finding no constitutional violation where penalty assessment became payable only after full review by an administrative body and federal court of appeals);[5] *Reisman* v. *Caplin*, 375 U.S. 440, 446-47 (1964) (statute creating penalties for failure to respond to summons did not violate *Young* where penalty provision "d[id] not apply where the witness appears and interposes good faith challenges to the summons"); *Yakus* v. *United*

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[5] Contrary to petitioner's suggestion (Pet. 22-23), there is no inconsistency between the ruling below and this Court's decision in *Thunder Basin*. In *Thunder Basin*, the Court held that the Mine Safety and Health Act precluded a pre-enforcement district court challenge to an agency directive. 510 U.S. at 207-216. The Court then declined to consider the plaintiff's claim that a lack of pre-enforcement judicial review would violate its due process rights. In relevant part, the Court explained that, notwithstanding potentially "onerous" penalties for noncompliance, the relevant statutory scheme did not create the "constitutionally intolerable" choice presented in *Young* because "the Secretary's penalty assessments become final and payable only after full review by both the Commission and the appropriate court of appeals." *Id.* at 218.

States, 321 U.S. 414, 437-438 (1944) (no denial of due process where statute provided an opportunity to test the validity of regulations without necessarily incurring penalties).

Contrary to petitioner's assertion (Pet. 3; see Pet. 20), CERCLA does not "impose[] treble damages plus penalties" for noncompliance with a Section 106(a) order. Only a federal court (exercising its discretion) can impose fines or punitive damages for such noncompliance. The court may take that step, moreover, only after the noncomplying party has been given the opportunity to argue that it was not a liable party; that the order was invalid; that it did not "willfully" violate the Section 106(a) order; or that it had "sufficient cause" to not comply pending judicial review. 42 U.S.C. 9606(b)(1), 9607(c)(3). Those protections against penalties are not purely "theoretical[]." Pet. 20. Even when they choose to levy penalties, courts often award far less than the maximum penalties available. See, *e.g.*, *United States* v. *Capital Tax Corp.*, No. 04-C-4138, 2007 WL 2225900, at *13 (N.D. Ill. Aug. 1, 2007) (awarding penalty of $750/day for noncompliance with Section 106 order and declining to award punitive damages), vacated on other grounds, 545 F.3d 525 (7th Cir. 2008); *United States* v. *Barkman*, No. CIV. A. 96-6395, 1998 WL 962018, at *18 (E.D. Pa. Dec. 17, 1998) (penalty of $100/day imposed for violation of Section 106 order).[6]

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[6] Petitioner argues (Pet. 21, 25) that, because EPA is not required to bring an enforcement action immediately, the agency can allow potential fines to accrue subject only to a five-year statute of limitations. See 28 U.S.C. 2462. In determining whether to assess CERCLA penalties, however, and in setting the amount of any penalty it chooses to impose, a court may take into account any undue delay by EPA in pursuing an

Petitioner does not contend that the court of appeals' rejection of its *Young*-based challenge conflicts with the decision of any other circuit. As the court below observed (Pet. App. 12a-13a), every court of appeals that has addressed a similar due process challenge has upheld the constitutionality of CERCLA Section 106's enforcement regime. See *Employers Ins.*, 52 F.3d at 664; *Solid State Circuits, Inc.* v. *EPA*, 812 F.2d 383, 388-391 (8th Cir. 1987); *Wagner Seed Co.* v. *Daggett*, 800 F.2d 310, 315-317 (2d Cir. 1986); see also *City of Rialto*, 581 F.3d at 872 (endorsing Seventh Circuit's holding in *Employers Ins.*).[7]

2. The court of appeals also correctly rejected petitioner's contention that collateral market reactions to a

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enforcement action. EPA's discretion in that regard thus does not render CERCLA inconsistent with *Young*. In any event, the district court found that petitioner had not offered any evidence to suggest that EPA in fact delays enforcement proceedings. Pet. App. 79a.

[7] See also *Raytheon Aircraft Co.* v. *United States*, 501 F. Supp. 2d 1323, 1331-1334 (D. Kan. 2007) (rejecting facial and as-applied *Young* challenges to Section 106 scheme); *Capital Tax*, 2007 WL 488084, at *4-*5 ("sufficient cause" defense and judicial discretion over penalties "avoids the *Ex parte Young* problem" and renders Section 106 scheme constitutional). Other courts (including this Court) have upheld similar enforcement schemes under other statutes. See, *e.g.*, *Thunder Basin*, 510 U.S. at 216 (finding no *Young* violation under Mine Safety and Health Act where penalties for violating order were payable only after administrative and judicial review); *Laguna Gatuna* v. *Browner*, 58 F.3d 564, 566 (10th Cir. 1995) (rejecting argument that precluding pre-enforcement review of Clean Water Act (CWA) compliance order was "constitutionally intolerable," even though recipient may have "to violate an EPA order and risk civil * * * penalties to obtain judicial review"); *Southern Ohio Coal Co.* v. *Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1426 (6th Cir. 1994) (similarly rejecting due process challenge to CWA enforcement provisions).

Section 106(a) order—in the form of negative effects on stock price, brand value, or credit rating—deprive a PRP of a protected property interest.

a. To have a protected property interest, a person must have "a legitimate claim of entitlement" to an interest created by "an independent source such as state law." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972). And to implicate the Due Process Clause, the deprivation of such a property interest must be caused by state action, not by purely private choices. See *Blum* v. *Yaretsky*, 457 U.S. 991, 1002-1005 (1982); *Mathews*, 424 U.S. at 332. As the court of appeals noted, petitioner points to no "independent source such as state law" for its purported property interest in stock price, brand value, or credit rating. Pet. App. 14a (citing *Roth*, 408 U.S. at 577). Petitioner also does not dispute that the type of harms it asserts are "consequential," *i.e.*, the result of a private market's reaction rather than the direct result of any governmental deprivation of a protected property interest. *Ibid.*

Petitioner instead contends that the court of appeals "artificially distinguish[ed] between the physical attributes of property" and less tangible interests such as credit rating or brand value. Pet. 28. That argument reflects a misunderstanding of the court of appeals' reasoning. If the government directly infringed on an intangible but protected property interest—by, for example, requiring petitioner to sell company stock for less than the market would bear—a different constitutional question would be presented. Under the CERCLA enforcement regime, however, any effect that a Section 106(a) order may have on a company's stock price or credit rating results from the independent choices of

persons outside EPA. Under petitioner's view, the Food and Drug Administration's unilateral issuance of a warning letter to a drug company (see *Matrixx Initiatives, Inc.* v. *Siracusano*, No. 09-1156 (Mar. 22, 2011), slip op. 14) or a public investigation by the Securities and Exchange Commission—either of which could cause a drop in a company's stock price or credit rating—would constitute a deprivation of a protected property interest. Acceptance of that theory would mark a dramatic departure from established regulatory practice.

b. Contrary to petitioner's contention (Pet. 12-15), the court of appeals' ruling does not conflict with this Court's decision in *Connecticut* v. *Doehr*, 501 U.S. 1 (1991). Petitioner reads *Doehr* to stand for the sweeping proposition that consequential harms to property interests trigger due process protection "even if imposed by 'the market' in response to the government action." Pet. 14. But the word "market" does not even appear in the *Doehr* opinion. Rather, *Doehr* stands for the much more limited proposition that consequential harms are relevant to the significance of the private interests at stake in the second step of the due process inquiry, *i.e.*, in determining what procedures are adequate once it has been determined that a deprivation of property has occurred. *Doehr* does not suggest that consequential harms *themselves* can constitute protected property interests in the first step of the due process analysis. As the court of appeals explained (Pet. App. 15a-16a), the Court in *Doehr* addressed consequential harms not in its threshold determination that the real property attachment at issue in that case triggered due process protection, but only in the subsequent portion of its opinion

determining the nature of the procedures required. See 501 U.S. at 11-12.

Doehr is one in a line of decisions in which this Court has considered "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure." 501 U.S. at 9. The statute at issue in *Doehr* authorized prejudgment attachment of real estate, and each of the prior cases cited by the Court also involved a prejudgment attachment, garnishment, or other seizure of property. *Id.* at 4, 9-10. The existence of a property deprivation was not seriously at issue in *Doehr* or in any of the cases cited therein. Rather, as the court of appeals observed (Pet. App. 15a-16a), the question was whether the interests affected by that deprivation were significant enough to require additional pre-deprivation process (and, if so, how much). See *Mathews*, 424 U.S. at 335 (identifying "the private interest that will be affected" as the first factor to consider in determining what process is due).

Read in full context, the passage from *Doehr* relied on by petitioner demonstrates that the Court considered the consequential harms only in applying the second step of the *Mathews* inquiry (*i.e.*, balancing the relevant factors to determine the adequacy of the procedures that the State had afforded), not in determining whether a deprivation of a protected property interest had occurred in the first place:

> We now consider the *Mathews* factors in determining the adequacy of the procedures before us. * * *
>
> We agree with the Court of Appeals that the property interests that attachment affects are significant.

> For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default.

Doehr, 501 U.S. at 11.

The Court acknowledged that an attachment, lien, or encumbrance could cause impairments requiring due process protections:

> [T]he State correctly points out that these effects do not amount to a complete, physical, or permanent deprivation of real property; their impact is less than the perhaps temporary total deprivation of household goods or wages. * * * But the Court has never held that only such extreme deprivations trigger due process concern. * * * [E]ven the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.

Doehr, 501 U.S. at 12 (citations omitted). But the recognition that even "temporary or partial" impairments caused by "attachments, liens, and similar encumbrances" have the potential to trigger due process protections is neither surprising nor instructive here. *Ibid.* As the court of appeals noted, attachments and liens "pluck a stick from the property owner's bundle and hold it as surety," thereby depriving an owner of some portion of its property rights. Pet. App. 16a (citation omitted). That limited holding does not support petitioner's contention that the consequential harms identified by the *Doehr* Court (a cloud on title, restraints on alienability,

a damaged credit rating) are deprivations *in themselves*, even when there has been no preceding attachment of property.

Petitioner attempts to analogize this case to *Doehr* by characterizing the market reactions that a Section 106(a) order may elicit as "the same sorts of consequential encumbrances" (Pet. 13) as were at issue in that case. The term "encumbrance," however, is defined as a "claim or liability that is *attached to* property or some other right and that may lessen its value, such as a lien or mortgage; *any property right that is not an ownership interest*." *Black's Law Dictionary* (9th ed. 2009) (emphasis added). Although a Section 106(a) order might affect the market's view of a PRP, such an order does not modify any recognized property right. See Pet. App. 14a. Nor do the consequential effects that petitioner foresees constitute "encumbrances." While a reduction in credit rating or a drop in brand value may create practical problems for a PRP, such private responses to an EPA order do not place any legal restraint on the PRP's property or operations.[8]

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[8] For essentially the same reasons, a Section 106(a) order is not meaningfully "analogous" to (Pet. 13), or the "functional equivalent" of (Pet. 18), government imposition of a lien or attachment. See *URI Student Senate* v. *Town of Narragansett*, 707 F. Supp. 2d 282, 300 (D.R.I. 2010) (holding that the loss of rent caused by the difficulty of renting property with a sticker indicating "unruly gathering" "is not the type of temporary injury to real property that has been held to violate due process"), aff'd, No. 10-1209, 2011 WL 17610 (1st Cir. 2011). Citing *Doehr*, the district court in *URI Student Senate* concluded that any loss of rent was "not due to any legal effect the sticker has, but the practical reality that potential renters find houses with stickers less desirable. Unlike liens or attachments, which create interests that might trump those of future tenants, buyers, or creditors, the sticker does not erect

c. Petitioner is likewise wrong in arguing (Pet. 15-16) that the decision below conflicts with the First Circuit's ruling in *Reardon* v. *United States*, 947 F.2d 1509 (1991) (en banc). The court in *Reardon* considered Section 107(*l*) of CERCLA, 42 U.S.C. 9607(*l*), which provides that "[a]ll costs and damages for which a person is liable to the United States" under Section 107(a) "shall constitute a lien in favor of the United States" on real property owned by that person and affected by a clean-up. Applying *Doehr*, the First Circuit concluded that the lien on real property created by Section 107 constitutes a deprivation of a property interest rendered "significant" by its consequential effects. *Reardon*, 947 F.2d at 1518-1519. The court in *Reardon* did not suggest, however, that the consequential effects of a lien constitute Fifth Amendment deprivations of property in and of themselves. The critical absence of a lien or similar encumbrance materially distinguishes this case from *Reardon* (and *Doehr*).

Petitioner also asserts (Pet. 16-17) that there is "tension" between the decision below and decisions of the

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any legal barriers to renting, selling, or mortgaging a residence. The 'orange sticker' provision is therefore not analogous to those encumbrances." *Ibid.*; see *URI Student Senate*, 2011 WL 17610, at *6 (court of appeals concludes that lost rent allegedly attributable to sticker was not a viable "plus factor" for "stigma plus" due process claim). See also, *e.g.*, *Industrial Safety Equip. Ass'n* v. *EPA*, 837 F.2d 1115, 1121-1122 (D.C. Cir. 1988) (government report's potential "indirect effect" on competition was "hardly * * * a constitutional deprivation of property deserving fifth amendment protection"); *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1354 (6th Cir. 1989) (any "commercial detriment" caused by change in regulatory policy was "an indirect injury resulting from government action," not a cognizable property deprivation).

Second and Third Circuits. Petitioner's reliance on those decisions is misplaced.

In *Ford Motor Credit Co.* v. *NYC Police Department*, 503 F.3d 186 (2007), the Second Circuit considered the extent of a lienholder's right to participate in a civil forfeiture process whereby certain motor vehicles could be seized by the city. *Id.* at 188. The Second Circuit held that the lienholder was entitled to greater participation rights than the relevant city laws afforded because "a security interest is indisputably a property interest protected by the Fourteenth Amendment." *Id.* at 191. A Section 106(a) order, by contrast, neither creates nor impairs any security interest. Contrary to petitioner's suggestion (Pet. 16), the Second Circuit did not read *Doehr* to hold that consequential injuries alone constitute a deprivation of a property interest. Although the Second Circuit cited *Doehr*, it did so only in passing, as "cf." support for rejecting the city's argument that a delay in a forfeiture proceeding did not deprive Ford of its secured property interest in the present value of a seized vehicle. *Ford*, 503 F.3d at 192.

In *Burns* v. *Pennsylvania Department of Correction*, 544 F.3d 279 (2008), the Third Circuit cited *Doehr* only for the proposition that even a temporary impairment of property rights potentially triggers due process protection. *Id.* at 281 n.2. That proposition is not at issue here. Moreover, the Third Circuit's holding that an unexecuted assessment on an inmate account constituted a deprivation of property was dependent on its conclusion that the assessment gave the Department of Corrections "something similar to a money judgment" in that the assessment rendered the account subject to seizure at any time. *Id.* at 288-290 & n.8. By contrast,

EPA cannot unilaterally compel compliance with a Section 106(a) order or obtain penalties for noncompliance; it must go to federal court to achieve those results.[9]

In any event, none of the cases cited by petitioner involved a challenge premised on the consequential harms that might result from issuance of a Section 106(a) order. The decision below is apparently the first to address petitioner's theory in the context of CERCLA Section 106, making this Court's review particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] The state cases that petitioner describes as "in tension with" the decision below (Pet. 18-19) are similarly inapt. Those cases all involve mechanics' lien laws, which grant a lien to secure payment for labor or materials supplied to improve or maintain property. See *Gem Plumbing & Heating Co.* v. *Rossi*, 867 A.2d 796 (R.I. 2005) (mechanics' lien law did not violate due process); *Connolly Dev., Inc.* v. *Superior Court of Merced County*, 553 P.2d 637 (Cal. 1976) (same); *Barry Props., Inc.* v. *Fick Bros. Roofing Co.*, 353 A.2d 222 (Md. 1976) (mechanics' lien law unconstitutional in part).